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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN JOSE DIVISION**
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12 JUAN OLIVEREZ, et al.,

13 Plaintiffs,

14 v.

15 STATE OF CALIFORNIA, et al.,

16 Defendants.
17

Case No. C-03-03658 JF

ORDER TO SHOW CAUSE RE
PRELIMINARY INJUNCTION;
TEMPORARY ORDER RESTRAINING
MAILING OF OVERSEAS BALLOTS

18 Plaintiffs seek a temporary restraining order and preliminary injunction prohibiting
19 Defendants from going forward with the statewide election on the recall of the Governor of
20 California scheduled for October 7, 2003 and from conducting any such election in the absence
21 of preclearance from the United States Department of Justice pursuant to Section 5 of the
22 Voting Rights Act of 1965, 42 U.S.C. §1973c ("Section 5"). The Court has read and considered
23 the legal briefing submitted on behalf of the parties as well as the oral arguments presented by
24 counsel at a hearing on August 15, 2003.

25 Defendants concede that the provisions of the California Constitution pursuant to which
26 the state Defendants permitted circulation of petitions for and thereafter scheduled the October 7,
27 2003 election on the recall of the Governor constituted changes in voting procedures within the meaning
28

1 of Section 5; that Monterey County is a covered jurisdiction pursuant to the Voting Rights Act, see
2 Lopez v. Monterey County, 519 U.S. 9, 12 (1996)¹; that accordingly Monterey County must obtain
3 preclearance of such changes from the United States Department of Justice or the United States District
4 Court for the District of Columbia prior to enacting or seeking to administer them; and that in the
5 absence of such preclearance neither Monterey County nor the state may proceed with the October 7,
6 2003 election. Plaintiffs ask the Court to restrain any further preparations for the election immediately;
7 Defendants ask that the Court refrain from entering any order based upon their expectation that the
8 Department of Justice will act on their request for preclearance “well before” the election.

9 Plaintiffs argue that permitting Defendants to obtain Section 5 preclearance after the changes in
10 question already have been implemented undermines a primary purpose of the Voting Rights Act, which
11 is to ensure that covered jurisdictions do not implement changes in voting procedures until preclearance
12 has been obtained. They assert that permitting preparations for the October 7, 2003 election to go
13 forward improperly rewards Defendants for their alleged lack of diligence in seeking preclearance and
14 subjects the Department of Justice to undue pressure to grant preclearance and that even preparatory
15 actions being undertaken by Defendants in anticipation of the election violate the extremely broad
16 provisions of the Voting Rights Act. They acknowledge, however, that the Department of Justice has
17 authority to entertain Defendants’ current effort to obtain preclearance and that the basis for any
18 injunctive relief from this Court will dissipate if and when such preclearance is obtained.²

20 ¹Three other California counties—Kings, Merced and Yuba—also are covered jurisdictions but
21 are not parties to the instant case. Counsel for the state advises that a request for pre-clearance on
22 behalf of these jurisdictions is pending.

23 ²Plaintiffs argue that Defendants should have sought Section 5 preclearance of California’s
24 current recall election procedures at or near the time the procedures were enacted as part of
25 Proposition 9 in 1974. Plaintiffs acknowledge, however, that the subject election is the first statewide
26 recall election since the enactment of Proposition 9 and that the need for Section 5 preclearance of the
27 procedures properly could have been raised (but was not) when the petitions seeking the recall first
28 were circulated. Although Plaintiffs contend correctly that the burden is on the state to comply with the
Voting Rights Act rather than on Plaintiffs to identify instances of non-compliance, the Court properly
may consider the advanced stage of the election process at issue here in fashioning an appropriate

1 Defendants contend that the public interest in allowing the electoral process to proceed is
2 compelling, that even a temporary interruption of their preparations for the October 7, 2003 election by
3 this Court would have the practical effect of delaying the election even if preclearance ultimately is
4 obtained, that they sought preclearance as soon as it was practicable to do so, and that allowing the
5 Department of Justice a reasonable time within which to consider their request while at the same time
6 allowing election preparations to go forward appropriately balances the interests at stake.

7 In a case such as this, the role of the district court is limited to a determination of 1) whether a
8 change in voting procedures triggers the preclearance requirement of Section 5, 2) whether
9 preclearance has been obtained, and 3) what temporary remedy, if any, is appropriate.

10 Lopez v. Monterey County, 519 U.S. at 23. The Court's goal "must be to ensure that the covered
11 jurisdiction submits its election plan to the appropriate federal authorities for preclearance as
12 expeditiously as possible." Id. at 24. It is clear in the present case both that the preclearance
13 requirement of Section 5 applies and that Defendants have not yet obtained preclearance. The only
14 question, therefore, is the appropriate extent of equitable relief.

15 This Court is extremely reluctant to intervene in or disrupt the electoral process unless it clearly
16 is compelled to do so. At the same time, permitting voting or other forms of direct political participation
17 to be affected by changes in voting procedures implemented in contravention of the Voting Rights Act
18 cannot be countenanced. Having considered the practical realities of the election process in light of
19 these principles, the Court finds for present purposes that the interests at risk if the election process is
20 permitted to proceed up to the point at which actual voting or other direct participation is implicated are
21 substantially outweighed by a compelling public interest in proceeding with the election as presently
22 scheduled, but that thereafter injunctive relief will be warranted in the absence of Section 5
23 preclearance. In the case of the recall election, voting is implicated first by Defendant Monterey
24 County's stated intention to mail absentee ballots to registered voters residing overseas as soon as
25 possible, and thereafter by the commencement of general absentee voting on September 8, 2003.

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27 equitable remedy. See Clark v. Roemer, 500 U.S. 646, 654-55 (1991).

1 Accordingly, and good cause therefor appearing, Defendants shall appear before this Court at
2 3:00 PM on Friday, August 29, 2003, in Courtroom 3 of the above-entitled Court, then and there to
3 show cause, if any they have, why they, their agents, servants, employees and those in active concert or
4 participation with them, should not be restrained and enjoined pending trial of this action from accepting
5 any ballots, including absentee ballots, or operating any polling place in connection with the special
6 statewide election currently scheduled for October 7, 2003 and from conducting any election
7 concerning the recall of the Governor in the absence of Department of Justice preclearance pursuant to
8 Section 5 of the Voting Rights Act of 1965. Counsel for Defendants shall advise the Court and
9 opposing counsel immediately of the substance of any and all communications from the United States
10 Department of Justice concerning the status of Defendants' request for Section 5 preclearance.

11 Pending the hearing, Defendant Monterey County is restrained from mailing absentee ballots to
12 overseas voters registered to vote in Monterey County until Section 5 preclearance has been obtained
13 or until further order of the Court.³ An undertaking shall not be required.

14 This Order shall be served on Defendants on or before August 18, 2003, and proof of service
15 must be filed on or before August 20, 2003. Any response or opposition must be filed and served by
16 facsimile on Plaintiffs' counsel on or before August 26, 2003; any reply to such response or opposition
17 must be filed and served by facsimile on Defendants' counsel on or before August 28, 2003. Because
18 counsel have submitted substantial briefing and provided the Court with extended legal argument in
19 connection with Plaintiffs' application for a temporary restraining order, briefing with respect to this
20 Order to Show Cause shall be limited to the response, if any, that Defendants have received from the
21 United States Department of Justice to their request for preclearance pursuant to Section 5 of the

22 _____
23 ³The purpose of this limited restraining order is to ensure that no person who casts a vote with
24 respect to the October 7, 2003 election does so pursuant to voting procedures that have not been
25 precleared pursuant to Section 5 of the Voting Rights Act. The Court notes that Monterey County
26 already has missed the statutory deadline for mailing overseas ballots and that this order will further
27 shorten the time available for mailing ballots to the voters in question, but it concludes that it has no
28 other alternative in view of the fact that the October 7, 2003 election cannot proceed in the absence of
Section 5 preclearance. The Court expresses no opinion as to what remedies, if any, may be available
to such voters under California law.

1 Voting Rights Act of 1965 and the legal effect of such response or lack thereof on the issues presented
2 by the instant case.

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4 IT IS SO ORDERED.

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6 DATED: August 15, 2003

(electronic signature authorized)

7 JEREMY FOGEL
8 United States District Judge
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Copies of this Order have been served upon the following persons:

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